Supreme Court, U.S.
FILED

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No. 96 512 SEP 30 1996

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In The

Supreme Court of the United States

October Term, 1995

FRANK SCYPTA,

Petitioner,

vs.

OGLEBAY NORTON COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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59pp

QUESTIONS PRESENTED FOR REVIEW

Whether the presumption contained in the Black Lung Act, and its regulations, can be rebutted by the opposing party merely going forward or whether the opposing party must bear the burden of persuasion regarding the issue involved.

LIST OF PARTIES TO PROCEEDINGS IN THE COURT BELOW

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TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties to Proceedings in the Court Below	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Regulations Involved	1
Statement of the Case	1
A. Statement of Facts	2
Reasons for Granting the Writ	8
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Central Appalachian Coal v. Fletcher, 679 F.2d 1086 (4th Cir. 1982)	10
Director v. Greenwich Collieries, 114 S. Ct. 2251 (1994)	9

Contents

	Page
Eagle v Armco, 943 F.2d 509 (4th Cir. 1991)	10
Freeman v. Benefits Review Board, 912 F.2d 172 (7th Cir. 1990)	10
Martin v. Alabama By-Products, 864 F.2d 1555 (11th Cir. 1989)	10
Thorn v. Itman, 3 F.3d 713 (4th Cir. 1993)	10
Warman v. Pittsburgh & Midway Coal Co., 839 F.2d 257 (6th Cir. 1988)	8
Warth v. Southeastern Ohio Coal, 60 F.3d 173 (4th Cir. 1995)	10
Y & O v. McAngues, 997 F.2d 130 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 683	9, 10
Y & O v. Webb, 49 F.3d 245 (6th Cir. 1995)	9, 10
Statutes Cited:	
21 U.S.C. § 932	1
28 U.S.C. § 1254(1)	1
Other Authorities Cited:	
20 C.F.R. § 727.203	1, 8
20 C.F.R. § 727.203(a)(2)	4

Contents

	Page
20 C.F.R. § 727.203(b)	1
20 C.F.R. § 727.203(b)(1)	2
20 C.F.R. § 727.203(b)(2)	2
20 C.F.R. § 727.203(b)(3)	2
Black's Law Dictionary	9
Dorland's Medical Dictionary (25th Ed)	3
Cecil's Textbook of Medicine	3, 6, 7

APPENDIX

Appendix A — Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit Filed July 2, 1996	1a
Appendix B — Decision and Order of the U.S. Department of Labor, Benefits Review Board Dated April 27, 1995	4a
Appendix C — Decision and Order of the U.S. Department of Labor, Office of Administrative Law Judges Dated October 29, 1991	11a
Appendix D — Decision and Order of the U.S. Department of Labor, Benefits Review Board Dated November 30, 1989	17a

Contents

Page

Appendix E — Decision and Order of the U.S. Department of Labor, Office of Administrative Law Judges Dated January 28, 1986 ..... 26a

Appendix F — Relevant Statutes 37a

OPINIONS BELOW

The opinion of the Sixth Circuit is unpublished but appears in the Appendix, as do those of the Administrative Law Judges and the Benefits Review Board.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 2, 1996. Jurisdiction is confirmed by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Federal Coal Mine Health and Safety Act, and its regulations, particularly 20 C.F.R. § 727.203.

STATEMENT OF THE CASE

The miner's claim for benefits was filed under the Federal Coal Mine Health and Safety Act, as amended, particularly 21 U.S.C. § 932.

ALJ James W. Kerr, Jr., issued "ALJ I," on January 28, 1986.

The Administrative Law Judge found that the claimant had established his entitlement to the benefit of the interim presumption. The ALJ also found that the Oglebay Norton Company had failed to establish rebuttal under 20 C.F.R. § 727.203(b).

The Oglebay Norton Company appealed to the BRB.

"BRB I," on November 30, 1989, affirmed the ALJ's finding that the interim presumption had been properly invoked

and that the evidence of record did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1), (2), and (4). The Board directed the ALJ to reconsider rebuttal pursuant to 20 C.F.R. § 727.203(b)(3).

On remand, the ALJ, on October 29, 1991, denied benefits to Mr. Scypta. "ALJ II" found that the evidence established rebuttal pursuant to 20 C.F.R. § 727.203(b)(3).

The Claimant-Petitioner filed a timely Notice of Appeal from ALJ II.

The BRB affirmed on or about April 27, 1995 in "BRB II".

The Sixth Circuit affirmed on July 2, 1996.

A. Statement of Facts

This claim for benefits began with the filing of a claim for benefits, first in 1973 and then in 1976.

On June 11, 1980, the Deputy Commissioner issued a notice of initial finding that Frank Scypta ("Scypta") was entitled to federal black lung benefits. A determination was rendered by the Deputy Commissioner on May 21, 1981, again determining that the claimant was eligible for benefits.

Following controversion of the claim by the Oglebay Norton Company, a hearing was held in Marietta, Ohio, on July 3, 1985. The miner was too sick to attend the hearing. Testifying on his behalf was his brother, Bruney Scypta ("Bruney"). In addition, the miner's daughter, Dolores Oszust, also testified on behalf of her father. The only other witness appearing at the hearing was Richard Orr, Safety Director of the Oglebay Norton Mine.

The hearing and other parts of the record confirm deficits in the breathing system.

Calcifications appear in and near the lungs. These are the result of the process where organic tissue becomes hardened by a deposit of calcium salts. *Dorlands Medical Dictionary* (25th Ed), p. 243.

A company-hired doctor, George Kress observed peripheral edema, sometimes associated with interstitial lung disease. DX 14/2. Cecil's, *Textbook of Medicine*, at 410.

Kress noted some pulmonary emphysema as well as some chronic bronchitis. DX 14, Ex. 11, pp. 24, 30-31; the claimant had a calcified density. Kress also found "hyperinflation."

The x-ray evidence of record includes six positive interpretations, including three positive interpretations by B-Readers. Only two physicians of record read the x-rays as negative; neither of them are radiologists.

The record also contains four pulmonary function studies:

Date	Physician	Result	Cooperation / Comprehension
8/22/83	Dr. Miklos Paal	FEV1 1.55 MVV 63	Good
6/17/76	Dr. Miklos Paal	FEV1 2.7 MVV 94	Good
12/1/80	Dr. Kress	FEV1 1.5 MVV 62	Inadequate
9/5/81	Dr. J. DelVecchio	FEV1 2.15 MVV 69	Good

Twenty C.F.R. § 727.203(a)(2) establishes the following disability standards for a person of the miner's height of 70 inches: FEV1 2.15 MVV 100.

Thus, three of the four studies produced results below the disability standards, although one of the three studies was discredited by Kress. All of the MVVs are below the disability level, while one FEV1 slightly exceeds the standards.

The following blood gas test results are included in the report:

Date	Result	Physician
3/20/74	PCO2 41 PO2 85	Dr. Paal
11/20/80	PCO2 43 PO2 92	Dr. Kress

The record also contains three narrative reports, the first compiled by Dr. Miklos Paal and dated April 9, 1974. Paal made the following diagnosis:

> On the basis of pulmonary function tests **marked** coal miner's pneumoconiosis.

(Emphasis added).

Paal further stated that the miner was "unfit for physical work."

Two years later, on June 17, 1976, Miklos Paal once again diagnosed coal workers' pneumoconiosis ("CWP"). Paal stated in his second report that the miner was "unfit for heavy coal miner's work." While the doctor did note that the diagnosed CWP was not disabling, he nonetheless

recommended that only light work be performed by Scypta. It is clear from the doctor's report that he had little appreciation of the arduous labor performed by Scypta in his ordinary and usual coal mining work.

The operator also submitted the testimony of George Kress. He offered the opinion that Scypta suffered from simple coal worker's pneumoconiosis. In his initial report dated October 1, 1980, Kress admitted that he had been unable to obtain an adequate pulmonary function study. In his analysis he noted:

> In so far as pulmonary or respiratory impairment is concerned, evaluation of a respiratory impairment in this man is somewhat difficult.

Nonetheless, he concluded:

> Considering the fact that he has not significant abnormal physical findings in his chest, that he did indeed have a normal ventilatory study in 1976, that he had normal arterial blood gas studies then at the time of our examination, it is my opinion he has no significant pulmonary or respiratory impairment. . . .

Petitioner argued to the Benefits Review Board that Kress's testimony underestimated the degree of physical exertion involved in Scypta's work. Kress stated that a foreman would not be doing work involving heavy exertion. Yet the uncontradicted testimony at hearing indicated that Scypta was required to walk great distances, carry a shovel, and regularly hand-shovel coal onto a conveyor belt. Scypta frequently

complained about his inability to perform his work because of breathing problems.

In summary, Kress initially concluded that the miner had CWP with no respiratory impairment.

The uncontroverted evidence of record demonstrates that the miner worked as an underground coal miner for **42 years**. He began his work as a timberman, setting posts throughout the mine in extremely dusty conditions. He strained his back twice. He endured a great deal of exposure to coal dust. *See* § 559 Cecil's, Textbook of Medicine, *Occupational Lung Diseases*, at 2281 (greater dust occurred at the face).

Scypta also worked as a loading machine operator. This job required a great deal of physical exertion and was "powerful dusty."

Scypta also worked as a face foreman. His brother, Bruney, who had served as the general superintendent of the mine in which the claimant last worked, testified that the job involved a great deal of walking and crawling. Bruney testified that in the Oglebay Norton Mine, supervisors routinely performed physical labor in order to expedite the mining of coal. Bruney described the work of a face foreman as arduous in light of the constant walking and other physical activities involved in the work. The conditions underground at this particular mine were quite difficult."

The miner last worked as a face foreman and belt-line foreman. Bruney testified that his brother was required to walk at least four miles a day at a good pace. He was constantly involved in physical labor, although he was not a classified employee. Face foremen and belt-line foremen would perform manual labor in order to keep production moving.

The testimony of the Safety Director for the employer confirmed that Scypta was required to do a great deal of crawling along the belt line as part of his last employment. He also testified that Scypta frequently carried a shovel with him along the belt line. His testimony clearly demonstrated that Scypta frequently used the shovel to manually load large quantities of coal back onto the belt line. He further testified that virtually all of Scypta's work involved walking or crawling.

Dolores Oszust, daughter of Frank Scypta, testified that her father suffered from a severe productive cough and shortness of breath. She testified that her father had trouble sleeping due to his breathing problems and regularly slept in a chair as a result. Prior to finishing his employment, he complained of difficulty in performing his job. After 1976, he was been unable to do any work around the house. At the time of the hearing, he was virtually housebound. He has since died.

She also testified that her father had been treating with Dr. Lewis for breathing problems.

The record proves breathing impairments.

He related dyspnea and coughing in 1981. ("Breathing is bad. I cough a lot.") He had "constant wheezing."

Kress admitted that if one study "was in any way valid", then the claimant did have some impairment.

Hospital records give a final diagnosis of chronic obstruction pulmonary disease.

Kress admitted chronic bronchitis can be caused by mine exposure. *See* Cecil's Textbook of Medicine, *Occupational Lung Disease*, at 2281.

REASONS FOR GRANTING THE WRIT

Claimant is presumed by the regulations to be disabled from legal Coal Workers' Pneumoconiosis. 20 C.F.R. § 727.203.

This finding was affirmed.

This should not be an easy burden to overcome, when added to the liberal interpretation afforded the Black Lung Act.

Warman v. Pittsburgh & Midway Coal Co., 839 F.2d 257 (6th Cir. 1988) states that the company has to rule out CWP as a cause of claimant's disability.

The issue is how that "rule out" standard was applied in this case, meaning whether it was fully applied.

The ALJ indicated that it was in fact not applied but instead another standard had been applied.

The ALJ states that the presumption meant that the company therefore had **to come forward with evidence.**

This was the 1986 decision; though the ALJ repeated the BRB "rule out" standard in his 1991 decision, there is no tangible sign upon whom the burden of ruling out legal CWP rested. There is no sign that "rule out" burden rested with the company in 1991.

The presumption means more than shifting a burden of production. It means that the company bears the burden of not merely coming forward with the evidence.

The company also bears the burden of persuasion.

Director v. Greenwich Collieries, 114 S. Ct. 2251 (1994) (burden of proof includes burden of persuasion).

That is clear in the recent cases from the Sixth Circuit. *Y & O v. Webb*, 49 F. 3d 245, 250 (6th Cir. 1995), *citing Y & O v. McAngues*, 997 F.2d 130, 133 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 683.

This argument by the miner and citation to the 1986 opinion was presented to the panel at oral argument.

In this case, Judge Wellford, concurring, indicated that this was a close case but that the BRB has "substantial evidence on which to conclude that the employer-respondent established rebuttal under *§ 727.203 (b)(3)*." App. A, p. 2a.

The panel found that the BRB was correct in its analysis. The closest the BRB came to analyzing the burden of proof is to say that it held "that the administrative law judge found rebuttal established."

As *Black's Law Dictionary* indicates, "establish" is a word with many meanings.

This difference in phrasing is crucial, for the BRB did not explicitly indicate that the ALJ found establishment **by the employer**, that he correctly assigned to the employer the twin burdens on this issue.

The BRB gave further indications that it — and the ALJ — applied the wrong standard. The BRB referred to Dr. Kress' conclusion "that he [the miner] was disabled due to multiple factors, including his age, cardiovascular abnormality and poor cerebral function, all unrelated to his coal mine employment." This is not rebuttal under *McAngues*: "An employer cannot

rebut the presumption of total disability by showing a second disability that is entirely independent of claimant's disabling pneumoconiosis." *Webb*, 49 F. 3d at 250, *quoting McAngues. Id.*

In brief and in argument, the miner indicated that rebuttal could not have been proven by the employer-respondent.

Kress believed that CWP can cause only a restrictive impairment, a belief that the Fourth Circuit indicated is "bizarre." *Warth v. Southeastern Ohio Coal*, 60 F.3d 173 (4th Cir. 1995) *relying on Eagle v Armco*, 943 F. 2d 509, 511, n. 2 (4th Cir. 1991).

Paal was hopelessly inconsistent, finding disabling and not disabling CWP. Paal initially reported that Mr. Scypta was "unfit for physical work."

In his second report, he noted that Mr. Scypta was "unfit for heavy coal miner's work" but stated that Mr. Scypta would perform light duty work.

The only way that the miner could have lost this case was by not giving him the full effect of the presumption and that is exactly what here occurred. Giving insufficient weight to the presumption is contrary to the articulated rule in the circuits. An employer undertaking rebuttal under 20 C.F.R. 727.203(b) bears a heavy burden. *Martin v. Alabama By-Products*, 864 F.2d 1555, 1559 (11th Cir. 1989) (Pozner, concurring). "Silence in the record will not defeat the presumption favoring the claimant." *Freeman v. Benefits Review Board*, 912 F.2d 172 (7th Cir. 1990) (citations omitted). *See Central Appalachian Coal v. Fletcher*, 679 F.2d 1086 (4th Cir. 1982) and *Thorn v. Itman*, 3 F.3d 713 (4th Cir. 1993).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 2, 1996

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-3656

FRANK SCYPTA,

Petitioner,

v.

OGLEBAY NORTON COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR REVIEW OF
AN ORDER OF THE BENEFITS
REVIEW BOARD OF THE UNITED
STATES DEPARTMENT OF LABOR

MEMORANDUM OPINION

BEFORE: WELLFORD, NORRIS, and DAUGHTREY, Circuit Judges.

PER CURIAM. Frank Scypta petitions this court for a review of the order of the Benefits Review Board denying him "black

lung" benefits claimed pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901-45. The Board's order affirmed a decision of an administrative law judge which denied benefits.

Having had the benefit of oral argument and having carefully considered the record before us and the briefs of the parties, we are not persuaded that the Benefit Review Board erred in affirming the decision denying benefits.

Because the reasoning which supports the denial of benefits has been articulated by the Board, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, we affirm the order denying benefits upon the reasoning employed by the Benefits Review Board in its decision and order issued April 27, 1995.

HARRY W. WELLFORD, Circuit Judge, concurring:

This is a close case, as is evidenced by the several hearings and administrative determinations in this record. I am persuaded, however, that the Benefits Review Board had substantial evidence on which to conclude that the employer-respondent established rebuttal under § 727.203(b)(3).

"Our review is limited to 'scrutiniz[ing] Board decisions for errors of law and for adherence to the statutory standard governing the Board's review.' " *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984) (quoting *Director, OWCP v. Rowe*, 710 F.2d 251, 254 (6th Cir. 1983)), *cert. denied*, 471 U.S. 1116 (1985); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980). The considered opinions of Drs. Kress and Paal "were corroborated by the objective studies of

record" in ruling out pneumoconiosis as a cause of claimant's disability.[1] I am not persuaded that *Warman v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257 (6th Cir. 1988), relied upon by claimant, supports Scypta's position. Substantial evidence in defendant's rebuttal proof showed "that pneumoconiosis was not a contributing cause to [the] miner's disability" under § (b)(3) supports our decision. *Warman*, 839 F.2d at 259. I, therefore, concur in the decision to AFFIRM.

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1. Interestingly, Dr. Kress' opinion was a significant component of the evidence in *Gibas*, 748 F.2d at 1120.

APPENDIX B — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD DATED APRIL 27, 1995

U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 92-0644 BLA
OWCP No. 285-05-7368

Date Issued: April 27, 1995

FRANK SCYPTA

Claimant-Petitioner

v.

OGLEBAY NORTON COMPANY

Employer-Respondent-Interest

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION AND ORDER

Appeal of the Decision and Order on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Appendix B

Edmund A. Sargus, Jr. (Burech & Sargus), St. Clairsville, Ohio, for claimant.

John G. Paleudis (Hanlon, Duff & Paleudis), St. Clairsville, Ohio, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (83-BLA-4989) of Administrative Law Judge James W. Kerr, Jr., denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). This case is before the Board for the second time. The Board previously affirmed the administrative law judge's findings that employer was the properly designated responsible operator, that invocation of the interim presumption was established pursuant to 20 C.F.R. § 727.203(a)(1), and that rebuttal was not established pursuant to 20 C.F.R. § 727.203(b)(1), (2) and (4). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case both for reconsideration of the evidence pursuant to Section 727.203(b)(3) and for consideration of the merits of entitlement under Part 718, if reached, *see Knuckles v. Director, OWCP,* 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). *See Scypta v. Oglebay Norton Co.,* BRB No. 86-466 BLA (Nov. 30, 1989) (unpub.).

On remand, the administrative law judge found that employer established rebuttal pursuant to Section

727.203(b)(3) and that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits. On appeal, claimant asserts that the administrative law judge erred in finding rebuttal established pursuant to Section 727.203(b)(3). Employer responds, urging affirmance of the Decision and Order on Remand as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not participated in this appeal.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding that rebuttal was established pursuant to Section 727.203(b)(3), the administrative law judge found that the opinions of Drs. Kress and Paal, as corroborated by the objective studies of record, ruled out pneumoconiosis as a cause of claimant's total disability. Decision and Order on Remand at 3. On appeal, claimant argues that, since neither physician diagnosed a totally disabling respiratory impairment, their opinions are insufficient to establish rebuttal in light of *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984) and *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11

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1. We affirm the administrative law judge's finding that claimant was not entitled to benefits under Part 718, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 2-62 (6th Cir. 1988). Claimant specifically asserts that the administrative law judge erred in finding Dr. Kress' opinion supported by its underlying documentation, in weighing and blood gas study evidence pursuant to Section 727.203(b)(3), and in excluding from consideration the pulmonary function study evidence, which claimant contends reveals the presence of a disabling respiratory disease.

In this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, if an employer proves that pneumoconiosis played no part in causing a miner's disability, then employer has satisfied the requirements of Section 727.203(b)(3). *Gibas*, 748 F.2d at 1120, 7 BLR at 2-65; *see Warman, supra; see also Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 251, 12 BLR 2-121 (6th Cir. 1989); *Roberts v. Benefits Review Board*, 822 F.2d 636, 10 BLR 2-153 (6th Cir. 1987); *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989). Where, however, pneumoconiosis is a contributing cause to a miner's total disability, he is conclusively entitled to benefits. *Id.* In the instant case, we reject claimant's assertions and hold that the administrative law judge properly found rebuttal established. Both Drs. Kress and Paal diagnosed pneumoconiosis, and thus, the administrative law judge may permissibly credit their opinions regarding the issue of whether claimant's pneumoconiosis is a contributing cause of the miner's disability, if addressed, *see Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *see also Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994) (*en banc*). Moreover, Dr. Kress specifically opined that claimant's total disability did not

arise in whole or in part out of his coal mine employment,[2] Deposition at 29, *see Gibas, supra; see also Roberts, supra; Warman, supra*. Regarding the cause of claimant's inability to perform his usual coal mine work, Dr. Kress concluded that he was disabled due to multiple factors including his age, cardiovascular abnormality and poor cerebral function, all unrelated to his coal mine employment, Employer's Exhibit 14. Dr. Paal's opinion will be discussed, *infra*.

With respect to claimant's specific contentions regarding the administrative law judge's weighing of the objective studies, we note that blood gas study and pulmonary function study evidence, while relevant with respect to the presence or absence of a respiratory impairment, are not determinative of causation and are alone insufficient to establish rebuttal pursuant to Section 727.203(b)(3), *see Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). In considering whether Dr. Kress' opinion was supported both by its underlying documentation and corroborated by the objective studies of record, the administrative law judge considered the entire report and did not independently evaluate the objective data to see whether it supported Dr. Kress' conclusions. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Moreover, contrary to claimant's assertion, Dr. Kress did not rely exclusively on the blood gas study evidence to rule out disability, but rather, relied on a

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2. Claimant also argues that both Drs. Paal and Kress were unfamiliar with the nature of claimant's usual coal mine work. As the Board previously affirmed the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(2), we note that the inquiry at Section 727.203(b)(3) is the source of claimant's disability; not whether he is able to perform his usual coal mine work. *See Gibas, supra; see also Warman, supra.*

physical examination, pulmonary function studies, blood gas studies, x-rays, and a review of the other medical evidence of record, Deposition at 46. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Based on his observation of claimant's poor performance during the pulmonary function study and his review of the other pulmonary function studies of record, Dr. Kress concluded that the pulmonary function studies were invalid due to claimant's cerebral defect, Employer's Exhibit 11; Deposition at 45. Consequently, the administrative law judge, within his discretion, permissibly found that Dr. Kress' opinion was supported by its underlying documentation, corroborated by the objective evidence of record, and sufficient to rebut the interim presumption of total disability. *See Director, OWCP v. Row*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1291 (1984). Such a determination is a credibility determination within the purview of the administrative law judge and will be affirmed unless irrational. *See Rowe, supra; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*) *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Finally, in finding rebuttal established, the administrative law judge found that Dr. Paal's opinion only corroborated Dr. Kress' opinion, *see* Decision and Order on Remand at 3. The administrative law judge properly concluded that Dr. Paal's opinion diagnosing a mild degree of not disabling pneumoconiosis, Director's Exhibits 15, 16, which is alone insufficient to establish rebuttal, merely corroborated the opinion of Dr. Kress, which constituted substantial evidence to establish rebuttal under Section 727.203(b)(3), *see Clark, supra; Lucostic, supra,* to find rebuttal established. Consequently, we affirm the administrative law judge's finding

that rebuttal of the interim presumption of total disability was established pursuant to Section 727.203(b)(3). *See Gibas, supra; see also Warman, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER OF THE U. S. DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES DATED OCTOBER 29, 1991

U. S. Department of Labor

Office of Administrative Law Judges
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

Date Issued: Oct 29, 1991

Case No.: 83-BLA-4989

OWCP No.: 285-05-7368

In the Matter of

FRANK SCYPTA,

Claimant,

vs.

OGLEBAY NORTON CO.,

Employer,

BUREAU OF WORKMAN'S COMP., OHIO,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest.

Appendix C

Appearances:
Edmund A. Sargus, Jr., Esquire
For the Claimant

John G. Paleudis, Esquire
For the Employer

Bruce C. Heslop, Esquire
For the Director

Before: James W. Kerr, Jr.
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. Section 901 *et seq.*, (hereinafter "the Act"). In accordance with the Act and the regulations issues thereunder, this case was referred by the Director, Office of Workers' Compensation Programs, to the Office of Administrative Law Judges for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis, or the survivors of persons who were so totally disabled at the time of their death or whose death was due to pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

The Court issue a Decision and Order — Awarding Benefits on January 28, 1986. That decision was appealed to the Benefits Review Board, which issued its decision on November 30, 1989. The BRB affirmed in part, reversed in part and remanded for reconsideration in light of its decision.

Appendix C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The BRB affirmed the Court's finding that the x-ray evidence was sufficient to invoke the interim presumption under Section 727.203(a)(1). The BRB also affirmed the Court's ruling that the Employer did not establish rebuttal of that presumption under Section 727.203(b)(1), (2) and (4). However, the BRB vacated the Court's determination that rebuttal was not established under Section 727.203(b)(3). In so doing, the BRB stated that the standard to be followed under Subsection (b)(3) is that the evidence must rule out pneumoconiosis as a cause of the claimant's disability. The BRB stated further that Dr. Paal's opinion, in conjunction with Dr. Kress' opinion, would be sufficient, if fully credited, to establish rebuttal under Subsection (b)(3). The BRB also ordered that the Court reconsider whether Dr. Kress' opinion deserves any weight, that the Court consider this claim under the Part 718 Regulations if the claim is denied under the Part 727 Regulations and also ruled that if benefits are awarded, that the Court reconsider the determination of the date of onset of total disability. Finally, the BRB affirmed the Court's finding that this was not a transfer case.

Section 727.203(b)(3) provides for rebuttal where the miner's disability did not arise, in whole or in part, out of coal mine employment. Dr. Paal examined the Claimant on June 17, 1976. (DX-16). He found a mild degree, not disabling, pneumoconiosis. The record includes a report of Dr. Kress who examined the Claimant on November 20, 1980 as well as a deposition of Dr. Kress. In his report, Dr. Kress indicated that there was no disability attributable to pneumoconiosis. In his deposition, he indicated he had reviewed the Claimant's medical records and believed that the information he had

indicated that the Claimant's total disability did not arise in whole or in part from coal mine employment or coal dust exposure. He stated that his opinion expressed in his report that the Claimant did not suffer from a pulmonary impairment was based upon the 1976 pulmonary function study, his physical findings and arterial blood gas study.

In the original decision, I discredited Dr. Kress' opinion because he had relied upon the 1976 pulmonary function study which was administered quite some time prior to the x-rays that were taken that invoke the presumption under Subsection (a)(1). However, in reviewing Dr. Kress' deposition, he did testify that he relied not only on the 1976 pulmonary function study, but also on his physical findings and arterial blood gas study along with the other medical information he had available. (See page 29 and 46 of Dr. Kress' deposition). Since the reports of Drs. Kress and Paal are corroborated by the objective studies of record, including the 1980 arterial blood gas studies, the Court finds that they are sufficient to rule out pneumoconiosis as a cause of the Claimant's disability. Accordingly, the Employer has established rebuttal under Section 727.203(b)(3).

The BRB ordered that this case be considered under the Part 718 Regulations if benefits were denied under the Part 727 Regulations. Since the Court has determined that Dr. Paal's and Dr. Kress' medical opinions establish that the Claimant is not totally disabled due to pneumoconiosis, the Claimant could not establish total disability under Section 718.204(c). Accordingly, the Claimant is not entitled to benefits under the Part 718 Regulations.

Appendix C

ENTITLEMENT

In reviewing this claim, the Record in its entirety has been considered. This includes the x-ray evidence, the results of the ventilatory and blood gas tests, the pattern of the symptoms, the medical opinions in evidence, the testimony of the lay witness and the age, education and experience of the Claimant. On the basis of that evidence, the Court concludes that Claimant is not totally disabled by pheumoconiosis arising out of coal mine employment. Claimant is, therefore, not entitled to benefits under the Act.

ATTORNEY'S FEE

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered to him in pursuit of this claim.

ORDER

It is hereby **ORDERED, ADJUDGED** and **DECREED** that the application for benefits of FRANK SCYPTA is **DENIED.**

s/ James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 725.481, and party dissatisfied with this Order may appeal it to the Benefits Review Board within 30 days from the date of this

Appendix C

Order by filing a Notice of Appeals with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036. *A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Francis Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.*

APPENDIX D — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD DATED NOVEMBER 30, 1989

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036
BRB No. 86-466-BLA
OWCP No. 285-05-7368

FRANK SCYPTA,

Claimant-Respondent

v.

OGLEBAY NORTON COMPANY,

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent

DECISION AND ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Edmund A. Sargus, Jr. (Burech & Sargus), St. Clairsville, Ohio, for claimant.

Appendix D

John G. Paleudis (Hanlon, Duff & Paleudis Co., LPA), St. Clairsville, Ohio, for employer.

Diane Hodes (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and AMERY, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (83-BLA-4989) of Administrative Law Judge James W. Kerr, Jr., awarding benefits and designating it as responsible operator on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that the evidence established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), and that the evidence was insufficient to establish rebuttal of this presumption pursuant to any subsection of 20 C.F.R. §727.203(b). The administrative law judge found further that the transfer provisions of the Black Lung Benefits Amendments of 1981 (1981 Amendments) were not applicable to the instant claim.

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Appendix D

On appeal, employer challenges the administrative law judge's finding that the evidence fails to establish rebuttal pursuant to subsections (b) (2) and (b) (3). Employer also challenges the administrative law judge's finding that the instant case does not possess a procedural history which would facilitate a transfer of liability pursuant to the 1981 Amendments. Finally, employer challenges the administrative law judge's determination as to the date from which claimant's benefits are to commence. Claimant, in response, asserts that the administrative law judge's findings are supported by substantial evidence, and urges affirmance. The Director, Office of Workers' Compensation Programs (the Director), in response asserts that the administrative law judge's finding that the transfer provisions of the 1981 Amendments are inapplicable to the instant case, is legally correct, and urges affirmance.

The Board's scope of review is defined by statute. The Decision and Order of the administrative law judge must be affirmed if it is supported by substantial evidence, is rational and is in accordance with law. 33 U.S.C. §921 (b) (3), as incorporated by 30 U.S.C. §932 (a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge found that invocation was established pursuant to subsection (a) (1) by the x-rays of record. As no party challenges this finding on appeal, this finding is deemed conceded for purposes of appeal and affirmed.[1] *See Skrach v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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1. As employer also fails to challenge the administrative law judge's implicit findings that the evidence fails to establish rebuttal pursuant to subsections (b) (1) and (b) (4), these findings are also deemed conceded for

(Cont'd)

Appendix D

Employer initially challenges the administrative law judge's finding that the evidence fails to establish rebuttal pursuant to subsections (b) (2) and (b) (3). With respect to rebuttal pursuant to subsection (b) (2), the administrative law judge correctly found that the record contains only the medical opinions submitted by Drs. Kress and Paal. Decision and Order at 5-6. In a medical report dated April 9, 1974, Dr. Paal advised that claimant was unfit for physical work (Dir. Ex. 15). In a subsequent report dated June 17, 1976, Dr. Paal maintained that claimant was unfit for "heavy coal miners work", and that light work was recommended. Dir. Ex. 16. Dr. Kress stated that while claimant was not totally disabled from a pulmonary standpoint, he was totally disabled due to his age, cardiovascular disease, and diminished cerebral function. Dir. Ex. 14, Emp. Ex. 11. Since this case arises within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit, employer is required to prove that claimant is not totally disabled, regardless of cause, in order to establish rebuttal pursuant to subsection (b) (2). *See York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987). The opinions of Dr. Kress and Dr. Paal are insufficient to establish rebuttal pursuant to subsection (b) (2). Accordingly, we affirm the administrative law judge's determination that the evidence is insufficient to establish rebuttal pursuant to subsection (b) (2).

(Cont'd)

purposes of appeal. *See Skrack, supra*. Moreover, we note that the United States Supreme Court has recently held that rebuttal pursuant to subsection (b) (4) is precluded in instances where the administrative law judge finds invocation established pursuant to subsection (a) (1). *Mullins Coal Company, Inc. v. Virginia v. Director, OWCP*, 484 U.S. __, 108 S.Ct. 427, 98 L.Ed.2d 450, 11 BLR 2-1 (1987) *reh'g denied* 484 U.S. __, 108 S.Ct. 787 (1988).

Appendix D

With respect to rebuttal pursuant to subsection (b) (3), the administrative law judge determined that Dr. Kress' opinion was the only opinion relevant to the issue of total disability due to pneumoconiosis. Decision and Order at 6. The administrative law judge, thereafter, discredited Dr. Kress' opinion on the basis that the evidence was too old to be reflective of claimant's medical condition as of the date of the hearing. Employer first contends that the opinions of Drs. Kress and Paal establish rebuttal pursuant to subsection (b) (3). Regarding the etiology of claimant's disability, Dr. Paal diagnosed the presence of a mild degree of pneumoconiosis but stated that it was "not disabling". Dir. Ex. 16. Dr. Kress stated that claimant has no disability attributable to his pneumoconiosis. Dir. Ex. 14, Emp Ex. 1. The United States Court of Appeals for the Sixth Circuit has held that the party opposing entitlement must rule out pneumoconiosis as a cause of claimant's disability in order to establish rebuttal pursuant to subsection (b) (3). *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). Since Dr. Paal's opinion, in conjunction with Dr. Kress' opinion would be sufficient, if fully credited, to establish rebuttal pursuant to subsection (b) (3), and since the administrative law judge did not discuss the impact of Dr. Paal's conclusions, we vacate the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to subsection (b) (3). On remand, therefore, the administrative law judge must reweigh *both* opinions under the standard set forth by the Sixth Circuit in *Gibas, supra*, and *Warman, supra.*

Employer also contends that the administrative law judge erred by discrediting Dr. Kress' opinion based upon his reliance on evidence which was nine years old. Employer asserts that Dr.

Kress' opinion was based upon all the evidence in the record, not just the oldest evidence. On remand, therefore, we instruct the administrative law judge to discuss the effect of employer's argument and to discuss the Court's holding in *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988) on the instant claim.[2] On remand, the administrative law judge should also discuss the claim pursuant to 20 C.F.R. Part 718 should he find on remand that entitlement is not established pursuant to Part 727. *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Saginaw Mining Company v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).[3]

Employer next contends that the administrative law judge erred when he found that the instant case did not possess the procedural history sufficient to afford a transfer of liability from the employer to the Black Lung Disability Trust Fund pursuant to the 1981 Amendments. The administrative law judge found that since claimant exhibited an intent to present additional evidence within a year from the date of the denial letter, the claim was not finally denied, and thus, liability does not transfer pursuant to the 1981 Amendments. The relevant procedural history of this case is as follows: Claimant filed a Part C claim with the Department of Labor (DOL) on August

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2. In *Cooley, supra*, the Court noted that the presumptions contained in the Act and regulations would be of little value if they could be rebutted by medical opinions conducted at a time before claimant had established the conditions required to trigger the presumption.

3. Since the Sixth Circuit has held that 20 C.F.R. §410.490 does not apply to claims such as the instant claim where the miner has established ten or more years of coal mine employment, *see The Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989), the administrative law judge need not consider entitlement pursuant to this regulation.

14, 1973. Dir. Ex. 1. Thereafter, on June 13, 1974, the claims' examiner sent a letter to claimant, noting that he was still working, and therefore, claimant was required to establish the presence of complicated pneumoconiosis in order to establish entitlement. The letter further stated that this letter was *not* a final determination, and the claimant had twenty days to submit additional evidence. Dir. Ex. 23. After claimant replied on July 9, 1974, stating that he did not wish to pursue this claim (Dir. Ex. 24), the claims' examiner sent a second letter, dated August 14, 1974,[4] to claimant stating that after receiving this reply, the claim would be considered abandoned unless a reply was received within ten days. Dir. Ex. 25. Claimant, thereafter, filed a timely reply on August 20, 1974, stating that he wished to keep his claim open (Dir. Ex. 26). Claimant sent a similar letter to the Deputy Commissioner on August 9, 1975. Dir. Ex. 27. Claimant then filed a second Part C claim with DOL on April 12, 1976. Dir. Ex. 2.

The Board has held that letters which are intended to inform claimant are merely warning letters that the claim *may* be denied unless additional evidence is submitted. *See Edwards v. Central Coal Co.*, 7 BLR 1-712 (1985); *Hubick v. New-Con Coals, Inc.*, 7 BLR 1-628 (1984). In the instant case, the correspondence from the Deputy Commissioner states that they are *not* final determinations, and the letters contain no language indicating a denial of eligibility. *Edwards, supra*; *Rubick, supra*. Therefore, we hold that the instant claim was *never* denied, and thus, transfer is precluded. *See Chadwick v. Island Creek Coal Co.*, 7 BLR 1-883 (1985). Therefore, we

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4. As employer correctly notes, the administrative law judge erroneously identified the date of this document as August 14, 1973 (Decision and Order at 2) when in fact, the correct date is August 14, 1974. Dir. Ex. 25. We note this typographical error.

affirm the administrative law judge's denial of employer's motion to be dismissed, and we affirm the administrative law judge's finding that transfer of liability pursuant to the 1981 Amendments did not occur in the instant case.

Finally, employer challenges the administrative law judge's finding of April 1, 1976 as the date from which benefits commence. The administrative law judge ordered benefits to commence from this date (the beginning of the month from the date of claimant's filing of the *second* claim) without any finding regarding the onset of total disability. *See* 20 C.F.R. §725.503. The Board has held that where the administrative law judge fails to explain his finding regarding the onset date of total disability, remand is warranted. *See McFarland v. Peabody Coal Co.*, 8 BLR 1-163 (1985); *Hall v. Director, OWCP*, 7 BLR 1-696 (1985). Accordingly, we vacate the administrative law judge's determination that April 1, 1976, is the date from which benefits commence. On remand, therefore, the administrative law judge must render an onset determination pursuant to the standard set forth in *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989) should he again determine that claimant is entitled to benefits. *See also* 20 C.F.R. §725.503; *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989).

Accordingly, the Decision and Order of the administrative law judge is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

SO ORDERED.

s/ Roy P. Smith
ROY P. SMITH, Chief
Administrative Appeals Judge

s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

s/ Robert S. Amery
ROBERT S. AMERY
Administrative Law Judge

Dated this 30th
Day of November 1989

APPENDIX E — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES DATED JANUARY 28, 1986

U.S. Department of Labor

Office of Administrative Law Judges
Suite 901, 101 Howard Avenue
New Orleans, LA 70113

Case No. 83-BLA-4989

OWCP No. E 285-05-7368

In the Matter of

FRANK SCYPTA

Claimant

against

OGLEBAY NORTON CO.

Employer

BUREAU OF WORKMAN'S COMP., OHIO

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party in Interest

Appendix E

Edmond A. Sargus, Jr., Esq.
For the Claimant

John G. Paleudis, Esq.
For the Employer

Bruce C. Heslop, Esq.
For the Party in Interest

Before: JAMES W. KERR, JR.,
Administrative Law Judge

DECISION AND ORDER — AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* On July 3, 1985, a formal hearing was held in Marietta, Ohio. Based on the evidence adduced, I have made the following findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law

1. Application of Black Lung Amendments of 1981

On July 20, 1983, Employer moved that Employer be dismissed as Responsible Operator pursuant to the provisions of Section 205 of the Black Lung Benefits Amendments of 1981 (hereinafter 1981 Act). On November 20, 1983, Administrative Law Judge Marvin Bober denied Employer's motion. At the hearing, Employer again raised the issue of whether or not the 1981 Act applies to this claim. In particular, Employer notes that the original claim was filed on August 14, 1973; the original claim was denied on June 13, 1974 and Claimant filed a

new claim on April 12, 1976. Judge Bober found that Claimant's correspondence following the August 14, 1973 denial demonstrated Claimant's intent to present additional evidence. In letters dated August 20, 1974 and August 9, 1975, Claimant stated he did not want to pursue his claim at that time as he was still working, but that he did wish to retain his August 1973 filing date and that he would pursue his claim on retirement from coal mines. (Dir. Exh. 26 and 27). I agree with Judge Bober that Claimant did exhibit an "intent to present additional evidence".

Section 205(b)(i)(2)(A) demands the absence, for an entire year following the denial of a case, of an indication by Claimant of an intent to present additional evidence for a claim to be "denied" within the meaning of the 1981 Act. Since Claimant did exhibit an intent to present additional evidence, this claim was not "denied" within the meaning of the 1981 Act and, therefore, liability does not transfer. Employer, therefore, remains liable for any benefits to which Claimant is entitled.

2. Background

Statements from his employers indicate Claimant was employed in the coal mines for forty-two (42) years. (Dir. Ex. 6, 8). He last worked as a belt examiner, and he also worked as a foreman and timberman earlier in his career. Richard Orr, Safety Director for Employer, testified that the belt examiner's duties included walking the length of the belt and reporting any hazards. Although the belt examiner was not responsible for spilled coal, Mr. Orr testified Claimant did help shovel coal to clean up a spill. (Tr. 67-68).

Claimant had one dependent, his wife Edna Scypta, for

purposes of benefit augmentation under the Act. A death certificate submitted indicates Mrs. Scypta died on November 7, 1984.

3. Pneumoconiosis and Total Disability

Regulations implementing the Act establish a rebuttal interim presumption. This provides that a claimant with at least ten years of coal mine employment is totally disabled due to pneumoconiosis if he meets any one of the criteria set forth in 20 C.F.R. § 727.203(a)(1) through (a)(4). Since Claimant has met the ten year requirement, this section is applicable.

Claimant may qualify for the presumption under Section 727.203(a)(1) if a chest x-ray, biopsy or autopsy establishes the existence of pneumoconiosis. The record includes the following x-ray reports:

Exhibit	Date	Physician	Finding
Dir. 21	8/22/73	_____	2/1 p
Dir. 19	8/22/73	J. Altman	0/0
Em. 9	8/22/73	R.B. Altmeyer (B-Reader)	0/1 p, q
Dir. 22	6/17/76	J.T. McMurray	1/1 q
Em. 9	6/16/76	R.B. Altmeyer B-Reader	0/0
Em. 3	8/3/76	Merrill Wymer	essentially normal

Appendix E

Em. 11	11/20/80	G.O. Kress	1/0 p, q
Em. 9	11/20/80	R.B. Altmeyer B-Reader	0/0
Em. 11	11/5/81	G.O. Kress	1/0 p, q
Cl. 1	11/5/81	Merrill Wymer Bd. Cert. Rad.	1/1 p 0/1 s
Cl. 2	11/5/81	Maurice Bassali B-Reader	2/2 p, q
Em. 10	11/5/81	R.B. Altmeyer B-Reader	0/1 p, q

After considering all the x-ray evidence, I find claimant has invoked the presumption under Section 727.203(a). On the most recent x-ray, taken November 5, 1981, all the physicians found radiographic evidence of pneumoconiosis. Although Dr. Altmeyer did not find evidence of a profusion sufficient to invoke the presumption, other highly qualified physicians did find radiographic evidence in a profusion sufficient to invoke. Under these circumstances, I find Dr. Altmeyer's opinion outweighed by the opinions of Drs. Kress; Wymer and Bassali. Therefore, I find Claimant has invoked the presumption on the basis of the x-ray evidence.

To establish entitlement to the presumption under Section 727.203(a)(2), ventilatory studies must indicate the presence of a chronic respiratory or pulmonary disease according to the values outlined in that section. The record includes the following ventilatory studies.

Appendix E

EX No.	Date	Physician	FEV_1	MVV
DX 11	8/22/73	M. Paal	1.55	63
DX 12	6/17/76	M. Paal	2.7	94
DX 14, 18	11-20-80	G. Kress	1.5	—
CL 1	11/5/81	J.J. Delvecchio	2.15	69

After reviewing the tracings from the August, 1973 ventilatory study, Drs. Joseph L. Landry and George Kress agreed the study was invalid as demonstrated by the irregularity of the tracings. Drs. Landry and Kress, however, agreed the results of the June, 1976 study were valid. Dr. Kress stated Claimant could not comprehend the instructions given to him during the November, 1980 ventilatory study and, therefore, he did not perform the test correctly. Dr. Kress did not feel this was due to Claimant's refusal to cooperate, but rather to his mental confusion. Dr. Kress also reviewed the tracings of the November, 1981 ventilatory study. Dr. Kress stated the variation in the tidal volumes of the maximum voluntary ventilation tracings would not be acceptable.

Since questions have been raised as to the quality of the results on the August 1973, November 1980 and November 1981 ventilatory studies, I find those studies are not valid for purposes of invoking the presumption under Section 727.203(a)(2). On the remaining ventilatory study, Claimant demonstrated an FEV_1 of 2.7 L while the regulations require a miner of his height to demonstrate an FEV_1 equal to or less than 2.5 L to invoke the presumption. I find, therefore, Claimant has not invoked the presumption by the ventilatory studies included in the record.

Appendix E

Claimant may also qualify for the presumption by demonstrating, through blood gas studies, "the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated" by the values set forth in Section 727.203(a)(3). Claimant did not demonstrate such an impairment on the two blood gas studies included in the record. (DX 17, 18). I find, therefore, he has not invoked the presumption under 20 C.F.R. § 727.203(a)(3).

The final method Claimant may use to invoke the presumption is to establish the presence of a totally disabling respiratory or pulmonary impairment through other medical evidence, "including the documented opinion of a physician exercising reasoned medical judgment." 20 C.F.R. § 727.203(a)(4).

On April 9, 1974, Dr. Miklos Paal examined Claimant and reported his chest was normal with normal breathing pattern. Dr. Paal found expansions of Claimant's chest equal and normal, excursions of his diaphragms were normal, lung borders were normal, breath sounds were normal with no rales or wheezing. Dr. Paal reported markedly low spirometric tracings on ventilatory study, normal blood gas studies, and an atrial flutter by EKG. He diagnosed coal workers' pneumoconiosis on the basis of the ventilatory study results and atrial flutter by EKG, and he concluded Claimant was unfit for heavy work. (DX 15). On June 17, 1976, Dr. Paal again examined claimant and reported similar findings to his April, 1974 examination. One difference was the ventilatory study results which were normal in June, 1976. At that time, Dr. Paal diagnosed 1) mild degree, not disabling, coal workers' pneumoconiosis due to coal mine employment; 2) atrial flutter by EKG; and 3) cardiomegaly. He concluded Claimant was unfit for heavy work; light work was recommended. (DX 16).

Appendix E

Dr. George O. Kress examined claimant on November 20, 1980 and reported no increase in his PA diameter of the chest, normal resonance, limited expansion, vesicular breath sounds with no rales, ronchi or wheezes. Dr. Kress reported normal results on blood gas study, evidence of simple coal workers' pneumoconiosis on x-ray and his inability to obtain valid results on ventilatory study. Dr. Kress diagnosed 1) simple coal workers' pneumoconiosis; 2) pulmonary emphysema by x-ray; 3) chronic bronchitis by history; 4) arterioslerotic hypertensive cardio-vascular disease with cardiomegaly and evidence of carotid insufficiency. Dr. Kress concluded that Claimant was totally disabled due to a variety of factors, but he did not think Claimant's disability was due to coal workers' pneumoconiosis because of the normal ventilatory study in 1976. At a deposition taken on July 1, 1985, Dr. Kress stated he thought Claimant was totally disabled due to severe cardiovascular disease and mental problems. He also explained that Claimant's failure to provide valid results on ventilatory study was due to Claimant's inability as a result of his mental impairment, not due to any unwillingness on claimant's part.

After considering Dr. Paal's reports and Dr. Kress' report and deposition testimony, I find Claimant has not invoked the presumption under 20 C.F.R. § 727.203(a)(4). Although Dr. Paal diagnosed the presence of pneumoconiosis, he does not conclude it is totally disabling. His finding that Claimant can do light work appears to indicate Claimant was capable of doing his coal mine work as a belt examiner. Dr. Kress clearly concluded that Claimant was not totally disabled due to a respiratory or pulmonary impairment. I find, therefore, Claimant has not invoked the presumption by physicians' reports.

Appendix E

4. Rebuttal of the Interim Presumption

Since Claimant produced evidence adequate to invoke the interim presumption, the burden of going forward shifts to employer to rebut it by establishing either the miner is doing or is capable of doing his usual coal mine employment, he does not have pneumoconiosis, or his disability did not arise out of coal mine employment. 20 C.F.R. § 727.203(b). The only physician's report which provides a basis for rebutting the presumption is Dr. Kress' opinion. I find, however, his opinion is insufficient to rebut the presumption. Dr. Kress' conclusion in 1980 and 1985 that Claimant is not disabled by pneumoconiosis is based on the normal ventilatory study results from 1976. At his deposition, therefore, he was relying on evidence nine years old. During these years, Claimant's condition could very well have changed, especially given the progressive nature of coal workers' pneumoconiosis. It should be noted that Dr. Merrill Wymer found no radiographic evidence of pneumoconiosis in 1976 and evidence of pneumoconiosis, category 1/1 p and 0/1 s in 1981. While radiographic evidence is not helpful in evaluating what level of impairment, if any Claimant has incurred as a result of coal workers' pneumoconiosis, these x-ray reports do indicate a change in Claimant's condition between 1976 and 1981. Based on this radiographic evidence that the pneumoconiosis had progressed and based on the progressive nature of pneumoconiosis, I find Dr. Kress' opinion of no disability due to pneumoconiosis based on a 1976 ventilatory study is insufficient to rebut the presumption. Accordingly, I find Claimant is entitled to benefits under the Act.

Appendix E

5. Attorney's Fees

Claimant's representative may submit a petition for attorney fees within thirty (30) days of the date this Decision and Order is issued, pursuant to the provisions of 20 C.F.R. §§ 725.355 and 725.365. Copies shall be provided to all parties.

Appendix E

ORDER

Ogleby Norton Company shall pay to Claimant, Frank Scypta, all benefits to which he is entitled, augmented by reason of his one dependent, his wife Edna Scypta, through October, 1984, commencing April 1, 1976.

Entered this 28th day of January, 1986, at New Orleans, Louisiana.

s/ James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

JWK:lbg
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NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, Suite 757, 1111 20th Street, N.W., Washington, D.C. 20036

APPENDIX F — RELEVANT STATUTES

30 U.S.C. § 901

§ 902. Definitions

For the purposes of this title —

* * *

(b) The term "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413 [30 USCS § 923(b) and (d)] except that —

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if

there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under Section 223(d) of the Social Security Act [42 USCS § 423(d)]; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

* * *

30 U.S.C. § 921

§ 921. Regulations and presumptions

(a) Promulgation; payment of benefits. The Commissioner of Social Security shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or, except with respect to a claim filed under Part C of this title on or after the effective date of the Black Lung Benefits Amendments of 1981, who at the time of his death was totally disabled by pneumoconiosis.

Appendix F

(b) Promulgation of standards determining total disability. The Commissioner of Social Security shall by regulation prescribe standards for determining for purposes of section 411(a) [subsec. (a) of this section] whether a miner is totally disabled due to pneumoconiosis and for determining whether the death of a miner was due to pneumoconiosis. Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of this title [enacted Dec. 30, 1969], and in no event later than the end of the third month following the month in which this title is enacted [enacted Dec. 30, 1969]. Final regulations required for implementation of any amendments to this title shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of such amendments, and in no event later than the end of the fourth month following the month in which such amendments are enacted. Such regulations may be modified or additional regulations promulgated from time to time thereafter.

(c) Presumptions. For purposes of this section —

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.

(2) If a decreased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be rebuttable presumption that his death was due to pneumoconiosis. The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981.

Appendix F

(3) If a miner is suffering or suffered from a chronic dust disease of the lung with (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this title and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death, he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Commissioner of Social Security shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground

mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Commissioner of Social Security may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981.

(5) In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 [enacted March 1, 1978] who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a)(2) [30 USCS § 922(a)(2)], unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Commissioner of Social Security, furnish such evidence as is available with respect to the health of the miner at the time of his or her death. The provisions of this paragraph shall not apply with respect to claims filed on or after the day that is 180 days after the effective date of the Black Lung Benefits Amendments of 1981.

(d) Applicability of presumptions. Nothing in subsection (c) shall be deemed to affect the applicability of subsection (a) in the case of a claim where the presumptions provided for therein are inapplicable.

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